Louisiana Law Review

Volume 36 | Number 2
The Work of the Louisiana Appellate Courts for the 1974-1975 Term: A Symposium
Winter 1976

Procedure: Evidence

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EVIDENCE

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OTHER CRIMINAL OR WRONGFUL ACTS

Evidence of Other Crimes—Non-Compliance with Notice Requirement

As might be expected, a very large number of the cases decided during the past year dealt with the admissibility of evidence of extraneous crimes. In light of the possible prejudice involved, Louisiana R.S. 15:445 and 446 set the face of the law against the admissibility of such evidence except in exceptional circumstances.

State v. Prieur[1] and *State v. Moore*[2] represent forceful judicial implementation of the legislative policy against admissibility of extraneous crimes evidence.[3] The *Prieur* decision laid down certain guidelines relative to the admissibility of evidence of other crimes, one of which was that except as to extraneous crimes admissible as part of the res gestae, or evidence of convictions to be used for purposes of impeachment, the prosecution is to furnish written notice to the defendant in advance of trial disclosing the exception relied upon for admissibility. What if the written notice is given, denominating in good faith what the court considers an inappropriate exception, but the evidence is nonetheless properly admissible under some other exception? This is the problem addressed by the court in *State v. Banks*,[4] perhaps the most important decision in this area decided during the past year. A majority of the Louisiana Supreme Court took the position that under the circumstances, admission of the evidence did not necessitate reversal, that the prosecution should not be

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1. 277 So. 2d 126 (La. 1973).

2. 278 So. 2d 781 (La. 1973).

3. See the discussion of the problem in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525 (1975); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443 (1974); Comment, *Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., in the Case in Chief*, 33 LA. L. REV. 614 (1973), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 30 (1974) [hereinafter cited as PUGH].

4. 307 So. 2d 594 (La. 1975).

prejudiced for its good faith substantial compliance with the *Prieur* guidelines. The guidelines are just that—guidelines, not sacramental procedural technicalities, indicates the court. It is the purpose underlying the *Prieur* guidelines that is so important, and the guidelines are to be interpreted in light of their purpose.

Exclusiveness of 15:445 and 446 Exceptions

Louisiana R.S. 15:445 and 446 recognize three exceptions to the other crimes exclusionary rule—knowledge, intent, and system. *State v. Prieur*[5] acknowledged two other exceptions, both provided by statute: crimes forming part of the res gestae[6] and crimes for which conviction has been obtained and the same is inquired into for purpose of impeachment.[7] Are other exceptions to be recognized? Phrased differently, are these statutory listings to be regarded merely as the type of exception to be recognized, or as an exclusive listing? Other states recognize additional exceptions[8] and so do the Federal Rules of Evidence.[9] In *State v. Banks*,[10] despite the concern expressed by Justice Barham in dissent, the Louisiana Supreme Court held that under the narrow circumstances there presented,[11] other crimes evidence was admissible to show identity. "Identity" as here used apparently means substantially the same thing as the interpretation given "system" in *State v. Prieur*[12] and *State v. Spencer*.[13]

Also, in *State v. Graves*[14] the court indicated that the criminal flight of a defendant from the state to avoid prosecution, and a criminal attempt by him to procure false alibi witnesses, are, under proper circumstances, both admissible.

5. 277 So. 2d 126 (La. 1973).

6. See LA. R.S. 15:447-48 (1950).

7. LA. R.S. 15:495 (1950), *as amended by* La. Acts 1952, No. 180 § 1.

8. *See* C. MCCORMICK, EVIDENCE §§ 288-98 at 686-711 (Cleary ed. 1972) [hereinafter cited as MCCORMICK].

9. FED. R. EVID. 404(b).

10. 307 So. 2d 594 (La. 1975).

11. The other crime was close in time, took place at the same location, involved the same parties and was, said the court, "an almost identical transaction." Id. at 598.

12. 277 So. 2d 126 (La. 1973).

13. 257 La. 672, 243 So. 2d 793 (1971). For a case seemingly letting in other crimes evidence to show "identity," but expressly treating it as substantially the same thing as "system" or "modus operandi," see *State v. Vince*, 305 So. 2d 916 (La. 1974).

14. 301 So. 2d 864 (La. 1974). See discussion in text at notes 122-24, *infra*.

CHARACTER EVIDENCE

Character of the Victim and Victim's Threats Against the Accused.

Louisiana R.S. 15:482 precludes a defendant from introducing evidence as to the dangerous character of the victim of a crime or his threats against the accused absent "evidence of hostile demonstration or of overt act." A surprising number of cases decided during the past year concerned the subject.[15] One of the most significant is *State v. Walker*,[16] dealing with the relationship between the above article and Louisiana R.S. 15:447 relative to res gestae. After defining res gestae,[17] section 447 goes on to state that "what forms any part of the res gestae is always admissible in evidence."[18] Over protest by Justice Dixon, the court in *Walker* took the position that because of section 482, a threat which otherwise would be deemed part of the res gestae is inadmissible absent section 482's required showing of hostile demonstration or overt act. The court arrived at this conclusion by reasoning that since res gestae is an exception to the hearsay rule, when the hearsay rule is inapplicable, the res gestae admissibility rule is likewise inapplicable.[19] The reasoning thus would indicate that nothing would be admissible as part of the res gestae unless it would otherwise be excluded as hearsay.

It is submitted that the res gestae provision[20] should be interpreted as not merely delimiting when certain hearsay statements are admissible, but what evidence—statements and non-statements, hearsay and non-hearsay—is to be

15. *See* State v. Singleton, 311 So. 2d 881 (La. 1975); State v. Rester, 309 So. 2d 321 (La. 1975); State v. Chapman, 298 So. 2d 753 (La. 1974).

16. 296 So. 2d 310 (La. 1974).

17. LA. R.S. 15:447 (1950) provides in part: "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events."

18. Amplifying the matter, LA. R.S. 15:448 (1950) provides: "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

19. In this connection the court states: "Here, the fact of utterance only is important. Hence, testimony of threats is non-hearsay. Since threats, when offered in connection with a plea of self-defense, are non-hearsay, res gestae has no application to them." 296 So. 2d 310, 312 (La. 1974) (citations of authority omitted).

20. LA. R.S. 15:447-48 (1950).

deemed relevant and admissible. For example, an act which is itself criminal, such as a battery committed during the course of a bank robbery, is, under proper circumstances, admissible as part of the res gestae[21] even though, of course, the battery is not in any way hearsay. Similarly, it is believed that such statements as, "Give me your money," uttered during the course of an armed robbery, though not hearsay, are generally properly admissible under the authority of Louisiana R.S. 15:447 and 448.[22]

Further, it is submitted that the approach of the majority in *Walker* ascribes much too broad an ambit to section 482. It is believed that the section is generally directed towards barring threats occurring prior to the alleged criminal incident, absent the prerequisite showing that tends to give them a special relevance or meaning. It is urged that it should not be interpreted to bar threats occurring contemporaneously with the criminal act charged, that it should not necessarily bar showing evidence of threats that legitimately form part of the res gestae, as narrowly defined by Louisiana R.S. 15:447 and 448.[23] The question, it is submitted, is fundamentally one of relevance and of prejudice, not hearsay.

In *State v. Harding*,[24] although noting that a trial court's determination as to whether there is evidence of hostile demonstration or overt act will not be reversed unless clearly erroneous,[25] the court stressed that the trial court's factual determination is subject to appellate review.[26] Recognizing that the prerequisite quantum of evidence was reduced by the legislature in 1952,[27] the court, upon analyzing the tes-

21. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525 (1975); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443 (1974).

22. See Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969), reprinted in PUGH at 494.

23. *See* State v. Cordier, 297 So. 2d 181 (La. 1974) (dealing with threats against the victim by the defendant at the scene of the crime and statements by him at that time as to prior assaults he had made on the victim).

24. 307 So. 2d 338 (La. 1975).

25. *See also* State v. Groves, 311 So. 2d 230 (La. 1975); State v. Jackson, 308 So. 2d 265 (La. 1975).

26. The court in the later case of *State v. Groves*, 311 So. 2d 230 (La. 1975), seems to reflect less willingness to exercise the review power. *See also* State v. Weathers, 304 So. 2d 662 (La. 1974).

27. La. Acts 1952, No. 239, substituted the word "evidence" for "proof" in LA. R.S. 15:482 (1950).

timony, concluded that the trial judge committed reversible error in finding that the prerequisite had not been established. The court hence reversed.

What is meant by "evidence" of hostile demonstration or overt act? The court struggled with the problem in *State v. Groves.*[28] Despite the 1952 amendment to section 482,[29] the majority in *Groves*[30] took the position that testimony "does not become evidence unless, in the opinion of the trial judge charged with determining the weight of the testimony, it is credible and competent to establish the facts which are necessary to constitute a hostile demonstration or overt act."[31] In his concurring opinion in *State v. Groves*[32] and his dissenting opinion in *State v. Weathers,*[33] Justice Tate argues most persuasively that the purpose of the 1952 amendment was to prevent the trial judge from rejecting testimony as to bad character or threats made by the decedent against the accused because he (the trial judge) disbelieved testimony with respect to the alleged overt act or hostile demonstration.

SCIENTIFIC EVIDENCE

Chemical Tests on Suspected Drunken Drivers—Qualifications for Person Making Blood Sample Analysis

In a decision with important practical consequences, a unanimous Louisiana Supreme Court, speaking through Justice Barham in *State v. Junell,*[34] held that the language of Louisiana R.S. 32:663 concerning blood sample analysis is mandatory, not directory. The cited provision spells out two criteria for blood sample analyses, that they be performed by methods prescribed by the state department of health and by a person who has been issued a permit to do so by that department. Relying on jurisprudence from other states and persuasive commentary, the court held that the absence of the described permit makes prosecution evidence as to the results of the test inadmissible.

28. 311 So. 2d 230 (La. 1975).

29. See discussion in note 27, *supra*, and accompanying text, and Justice Tate's concurring opinion in *Groves*, calling attention to the amendment.

30. *See* State v. Weathers, 304 So. 2d 662 (La. 1974).

31. 311 So. 2d 230, 238 (La. 1975).

32. 311 So. 2d 230, 241 (La. 1975).

33. 304 So. 2d 662, 664 (La. 1974).

34. 308 So. 2d 780 (La. 1975).

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

Pre-Trial Access to Witnesses

In the very significant decision of *State v. Hammler*,[35] the Louisiana Supreme Court makes abundantly clear that it is improper for a district attorney to advise prosecution witnesses not to speak to defense counsel, and found that the prosecutorial admonition "significantly interfered with the defendants' constitutionally guaranteed right to effective counsel."[36] Right to counsel, indicates the court, carries with it the opportunity for defendant's counsel to prepare the defense without such interference from the prosecution.[37]

Oath or Affirmation

In *State v. Pace*,[38] the Louisiana Supreme Court affirmed the trial court's taking the testimony of a six-year-old child, the victim of an alleged assault, without placing her under formal oath. The court cited the Code of Criminal Procedure authorization[39] to take testimony under either oath or affirmation and stressed that the trial court had made a careful inquiry of the child's understanding of the obligation to tell the truth. It found that in light of "the clarity of the court's inquiries and the consistency of the answer,"[40] in the context of the proceeding the child had "affirmed" to speak the truth. It appears, however, that the "affirmation" was inferred rather than precisely so expressed.

Necessity of Mistrial Because of Improper Questions re Arrests, Etc.

As an alternative basis for reversal, the court in *State v. Gaspard*[41] held that an improper prosecutorial question relative to other pending charges necessitated a mistrial and an

35. 312 So. 2d 306 (La. 1975).

36. *Id.* at 309.

37. The court relies heavily on a persuasive decision by the Court of Appeals for the District of Columbia in *Gregory v. Unites States*, 369 F.2d 185 (D.C. Cir. 1966).

38. 301 So. 2d 323 (La. 1974).

39. LA. CODE CRIM. P. art. 14.

40. 301 So. 2d 323, 325 (La. 1974).

41. 301 So. 2d 344 (La. 1974).

instruction to disregard was inadequate protection.[42] In the opinion of the writers the *Gaspard* case is sound.[43] A later case, however, *State v. Hatch*,[44] without citing *Gaspard*, indicates greater confidence in the efficacy of instructions to disregard, at least when the question is "non-assertive" in character.[45]

Unresponsive Answers by Police Officers

In *State v. Johnson*[46] Justice Barham in dissent makes a most persuasive argument that although generally "unsolicited, non-responsive prejudicial and inadmissible testimony by a witness is not imputable to the State,"[47] a different rule should apply to unresponsive answers by police officers.[48] He argues forcefully that in a criminal case "the police may be seen as an integral part of the State prosecutorial team and actions on the part of the police which deprive the defendant of his due process right to a fair trial should be imputed to the State."[49] Thereafter, in *State v. Foss*,[50] Justice Barham indicated grave suspicion when reading

> record after record in which experienced police officers, educated and trained to testify, seemingly explode with non-responsive, inadmissible remarks of great prejudice when asked innocent questions by the State and the defense.[51]

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42. LA. R.S. 15:495 (1950) provides in this connection: "[N]o witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

43. See *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Evidence*, 23 LA. L. REV. 406, 409 (1963), reprinted in PUGH at 100; Comment, *Prejudicial Effects of Unanswered Questions*, 19 LA. L. REV. 881 (1959), reprinted in PUGH at 95.

44. 305 So. 2d 497 (La. 1974).

45. *Id.* at 503. See also the analogous case of *State v. Whitley*, 296 So. 2d 820 (La. 1974), concerning a question as to a prior conviction where apparently no such conviction had occurred.

46. 306 So. 2d 724 (La. 1975).

47. *Id.* at 731.

48. See discussion in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 527 (1975).

49. 306 So. 2d 724, 731 (La. 1975).

50. 310 So. 2d 573 (La. 1975).

51. *Id.* at 577. Although contained in the majority opinion, Justice Barham in this connection did not speak for a majority of the court.

In *State v. Smith*[52] the court, speaking through Justice Tate, citing Justice Barham's dissent in *Johnson*,[53] discussed the problem in some detail and indicated that in the future the court might well want to reexamine its position in this area. Surely it does not seem unreasonable to insist that police witnesses be instructed to confine themselves to answering the questions asked only, and not to make references to such things as prejudicial, inadmissible, extraneous crimes.[54]

Questions of Witness by Judge

To what extent may a judge properly question a witness? In *State v. Groves*[55] the court, quoting and relying upon the 1943 decision of *State v. Graffam*,[56] makes it clear that the trial judge has broad powers to question a witness and "where anything material has been omitted it is sometimes his duty to examine a witness."[57] Further, said the court, in a proper case the trial judge may himself recall a witness "in order to supply an omission of proof on a material point."[58] The supreme court was careful, however, to make clear that in the trial judge's questioning of a witness he is to conduct the interrogation so as to impress the jury with his impartiality and not to indicate his opinion on the merits nor as to the credibility of the witness. And of course, he is to ask no question based on an assumption that the defendant is guilty.

Ambit of Cross-Examination

In *State v. Sears*[59] the court reiterated that on a hearing outside the presence of the jury as to the free and voluntary nature of a proffered confession, the defendant has the right

52. 310 So. 2d 580 (La. 1975).

53. 306 So. 2d 724, 731 (La. 1975).

54. *See* State v. Jackson, 301 So. 2d 598 (La. 1974); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 527 (1975). In *Jackson* the police officer witness's reference to the defendant's criminal and juvenile record was in reply to a question by the state, and although the court found that the response contained improper references, it concluded that under the circumstances of the case the trial court's strong and prompt admonition to the jury was sufficient to avoid undue prejudice to the defendant.

55. 311 So. 2d 230 (La. 1975).

56. 202 La. 869, 13 So. 2d 249 (1943).

57. 311 So. 2d 230, 240 (La. 1975).

58. *Id.*

59. 298 So. 2d 814 (La. 1974).

to take the stand limited to the voluntary nature of the confession. The court made clear, however, that if he takes the stand in the presence of the jury and testifies on the issue, he is subject to cross-examination as to the entire case.[60] In light of the United States Supreme Court's 1964 decision in *Malloy v. Hogan*[61] making the fifth amendment privilege against self-incrimination applicable to the states, an argument may now be made that subjecting a defendant who takes the stand in a criminal case to the broad rule of cross-examination may be unconstitutional.[62]

Curtailment of Cross-Examination

State v. Thornton[63] presents a fascinating question relative to curtailment of defendant's cross-examination of a prosecution witness. Both Justice Calogero speaking for the majority and Justice Barham in dissent recognize that under United States Supreme Court authority,[64] defense counsel generally have an unquestioned right to cross-examine a state witness to determine circumstances "identifying the witness with his environment"[65] and making clear "who the witness is, where he lives and what his business is."[66] Both opinions likewise recognize that under certain circumstances, such as where divulgence of place of residence would subject the witness to physical danger, curtailment of this right might be appropriate. The majority opinion relies heavily upon the trial judge's per curiam as demonstrating such danger to the state's witness and upholds the trial court's refusal to make the state's witness (a narcotics agent) divulge his place of residence. Justice Barham, in a very persuasive dissent, stresses that under the United States Supreme Court

60. For a discussion of the matter, see *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 345 (1972), reprinted in PUGH at 91.

61. 378 U.S. 1 (1964).

62. *See* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925); discussion in the Advisory Committee note to Federal Rules of Evidence 611(b) as originally promulgated by the United States Supreme Court, 56 F.R.D. 183, 274 (1972).

63. 309 So. 2d 266 (La. 1975).

64. Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931).

65. 309 So. 2d 266, 267 (La. 1975), quoting from Alford v. United States, 282 U.S. 687 (1931).

66. *Id.*

decisions the burden is upon the state or the witness *at the trial* to show such danger, and that it is improper for the trial judge in a *post trial* memorandum to make such a showing dehors the record. The majority position seems to present very serious federal constitutional problems and certainly in the future, if presented with a similar case, the prosecution, to protect itself, should attempt to make such a showing at the time of the trial, with full right of the defendant to contest and controvert the claimed basis for apprehension of danger to the witness.

Examination "Under the Rule"—Use of Testimony of One Party Against Co-Party

Under Louisiana Code of Civil Procedure article 1634 a party may call his opponent or his opponent's representative as a witness and examine him as under cross-examination without "vouching for his credibility, or being precluded from impeaching his testimony." May testimony thus adduced from an adverse party be utilized as substantive evidence against the adverse party's co-party? Following a long line of cases commencing with a decision by a division of the Louisiana Supreme Court in 1923 in *Edwards Brothers v. Berner*,[67] the First Circuit Court of Appeal in *Adams v. Ross*[68] holds that it may not.

With much deference to the *Edwards* case and its progeny, the writers suggest that a contrary position would be much more appropriate and much more in keeping with the end sought to be achieved by the statute. The so-called "rule" embodied in article 1634 is a reflection of the fact that generally a litigant's opponent and his representative would be adverse or hostile witnesses and hence that the prohibition against leading or impeaching one's own witness normally ought not to apply. But whether such a witness is or is not adverse, he is nonetheless a competent witness—as to himself, his co-party, and the opponent who calls him.[69] It is now recognized that when and under what circumstances leading questions should be permitted is largely within the discretion of the trial judge. Abuse of discretion in this area is rarely

67. 154 La. 791, 98 So. 247 (1923).

68. 300 So. 2d 192 (La. App. 1st Cir. 1974).

69. See LA. R.S. 13:3665 (1950), providing that a competent witness is "a person of proper understanding."

sufficiently grave to cause the appellate court to ignore evidence thus adduced, or to necessitate reversal.[70] Of course the mere circumstance that a party's co-party testifies to a particular fact would in no sense "bind" him, for technically a party is not "bound" even by his own testimony.[71]

In multi-party litigation if the position of *Edwards* persists a party wishing both to utilize article 1634 and to have the benefit of an opponent's substantive testimony against the opponent's co-party must call the opponent twice—once "under the rule" and once as his own witness. Such seems to these writers unduly complicated and repetitious—also quite a trap for an unwary litigant not familiar with the hypertechnical interpretation given by *Edwards*.

The voucher rule itself is under serious attack[72] and many, including the writers, would argue that whether one should be allowed to ask leading questions[73] or impeach[74] should be governed by more liberal, less rigid rules.

Rebuttal and Surrebuttal

In his dissents in *State v. Banks*[75] and *State v. Jackson*,[76] Justice Tate argues persuasively that the prosecution may not properly "divide its witnesses" and on the same point offer some in its case-in-chief and some on rebuttal, and that to allow it to do so may be very unfair to defendant.[77]

70. *See* State v. Fallon, 290 So. 2d 273 (La. 1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 533 (1975).

71. *See* Jackson v. Gulf Ins. Co., 250 La. 819, 199 So. 2d 886 (1967), discussed in *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. L. REV. 321, 326 (1970), reprinted in PUGH at 437; *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 438 (1968), reprinted in PUGH at 438. See also the discussion in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Evidence*, 23 LA. L. REV. 406 (1963), reprinted in PUGH at 439. Of course because of the so-called voucher rule, under certain circumstances a party may be precluded from impeaching his own witness. See MCCORMICK § 38 at 75-78.

72. *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

73. *See* Fed. R. Evid. 611(c), as originally promulgated by the United States Supreme Court.

74. *See id.* Rule 607, providing that any party may attack the credibility of a witness, including the party calling him.

75. 307 So. 2d 594, 600 (La. 1975).

76. 307 So. 2d 604, 609 (La. 1975).

77. As to the prejudice that might result from "saved evidence," *see* State v. Campbell, 263 La. 1058, 270 So. 2d 506 (1972).

Although Louisiana R.S. 15:282 expressly provides that "the defendant is without right to rebut the prosecution's rebuttal," Justice Barham forcefully urges in dissent in the *Banks* case that it would be unconstitutional to deny defendant an opportunity, under the usual limiting conditions, properly to impeach the state's rebuttal witnesses by extrinsic evidence on surrebuttal.[78] The writers agree. It is significant that the majority in *Banks* did not deny that in a proper case the defendant should be permitted to introduce proper impeaching evidence on surrebuttal.

ATTACKING CREDIBILITY OF WITNESSES

Cross-Examination as to Details of Crime Underlying Conviction

In *State v. Jackson*,[79] although recognizing that prior Louisiana cases have taken the position that a witness may not be interrogated about the details of the crime underlying his prior conviction, the majority of the court held that when a witness has been convicted of a crime he may be cross-examined as to its details in order to show "the true nature of the offense."[80] The court reached this conclusion by reasoning that the orthodox rule in the area is based upon "a misapplication of the rule concerning all past misconduct evidence,"[81] that the details of the crime are relevant as bearing upon credibility, and that in light of the conviction, risk of surprise is minimal. Three justices dissented.

With deference, these writers agree with the dissenting justices. The language of Louisiana R.S. 15:495 seems clearly to militate against such questioning.[82] A witness's other criminal acts, although certainly bearing on credibility, generally have relatively little probative value. Going into the details of such other crimes may be a "rabbit track" and serve to confuse the issues. Although the witness may not be "surprised"

78. 307 So. 2d 594, 603 (La. 1975).

79. 307 So. 2d 604 (La. 1975).

80. The *Jackson* case is cited as controlling and is apparently followed in *State v. Elam*, 312 So. 2d 318 (La. 1975).

81. 307 So. 2d 604, 607 (La. 1975).

82. LA. R.S. 15:495 (1950) provides in part that "no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

by the facts underlying the conviction, the defendant who called him may be shocked. Further, the jury is likely to give undue weight to such other extraneous crimes and thus "tar brush" the defendant with his witness's totally unrelated other crimes. If the rule of *Jackson* applies to a defendant who takes the stand, the prejudicial effect may be yet more serious for there is risk that the defendant may be convicted of the instant crime because of the egregious nature of the details of former crimes.

The instant case affords an excellent example, it is submitted, of the harm that may result by injecting into a case the details of a defense witness's other, and unrelated, crimes. Defendant Jackson's alibi witness had admitted committing the crime for which defendant was charged. On cross-examination he conceded that he had pleaded guilty to a different, apparently unrelated armed robbery, presumably quite an effective, and arguably sufficient, impeachment of the alibi witness's credibility. The court concluded, however, that the prosecution could, by questioning the witness, properly bring out that the armed robbery occurred during the course of an aggravated rape. It is quite possible that this other heinous crime might somehow in the jury's mind improperly and illogically have splashed over to muddy the defendant. It is submitted that whether or not defendant's witness had on another occasion been guilty not merely of armed robbery but also aggravated rape had very little to do with the witness's credibility or with whether the defendant had committed the instant crime.

The approach of the *Jackson* case seems to run counter to important decisions of the court in *State v. Moore*[83] and the second *State v. Prieur*.[84] *Jackson* is, however, a case of most unusual facts; the crime for which the witness had been convicted did not indicate another and intertwined crime of a

83. 278 So. 2d 781 (La. 1973), discussed in Comment, *Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc. in the Case in Chief*, 33 LA. L. REV. 614, 627, 629 (1973), reprinted in PUGH at 30, 42, 45; *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525 (1975); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443 (1974).

84. 277 So. 2d 134 (La. 1973), discussed in Comment, *Other Crimes Evidence in Louisiana—To Attack the Credibility of the Defendant on Cross-Examination*, 33 LA. L. REV. 630, 644 (1973), reprinted in PUGH at 111, 124; *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 453 (1974).

very serious nature. If the rule of *Jackson* were limited to this situation, its impact would be desirably narrowed. Unfortunately, however, the later case of *State v. Elam*[85] indicates a much broader application.

What Convictions May be the Subject of Inquiry?

For purposes of impeachment, Louisiana R.S. 15:495 authorizes questioning concerning "conviction of crime," and if the witness denies the conviction, it may be shown extrinsically. The phrase "conviction of crime" has been given a very broad interpretation by the courts, to include very old criminal convictions[86] and misdemeanors.[87] In *State v. Bradford*[88] the court said that the section contemplated the showing of a "conviction for the violation of a penal provision for which imprisonment can be imposed,"[89] and hence concluded that a court martial conviction for absence without leave was a proper subject of inquiry. From one standpoint (*i.e.*, giving a court martial conviction the status of a "crime"), the ruling seems broad. On the other hand, the decision appears to add a significant limitation as to what constitutes "crimes" for this purpose, *i.e.*, those offenses carrying the possibility of imprisonment.[90] In the opinion of these writers, the Louisiana legislature would be well advised to limit use of convictions for purposes of impeachment to those reflecting more directly upon truth and veracity.[91]

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85. 312 So. 2d 318 (La. 1975).

86. *See* State v. Rossi, 273 So. 2d 265 (La. 1973) (a 25-year-old conviction), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 451 (1974). *Cf.* the limiting approach taken in FED. R. EVID. 609(b).

87. State v. Odom, 273 So. 2d 261 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 452 (1974).

88. 298 So. 2d 781 (La. 1974).

89. *Id.* at 792.

90. *Cf.* LA. R.S. 14:7 (1950), providing: "A crime is that conduct which is defined as criminal in this Code, or in other acts of the legislature, or in the constitution of this state."

91. FED. R. EVID. 609, for example, permits such use of the conviction "only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonest or false statement, regardless of the punishment."

In *State v. Williams*[92] the court makes it clear that juvenile court adjudications generally may not be inquired into for purposes of conviction-type impeachment.[93] The court recognized, however, that in light of *Davis v. Alaska*,[94] under certain circumstances a defendant has a constitutional right to inquire into a state witness's juvenile record in order to show bias, interest or corruption.

Prior Inconsistent Statement—Limiting Instruction as to Effect

A few years ago, *State v. Ray*[95] made it abundantly clear that where a non-defendant witness has denied making an out-of-court statement which, if given substantive value, would tend to show the guilt of the defendant, the defendant, if he requests it, is entitled to have the trial court give a contemporaneous instruction to the jury that the testimony as to the out-of-court statement is to be given impeaching value only. Thus it is to be used only as going to the credibility of the witness on the stand, not to be given substantive weight. If, instead of denying the out-of-court statement, the witness under similar circumstances admits having made it, is the defendant likewise entitled to such an instruction as to its weight? In the important case of *State v. Kaufman*,[96] the majority, speaking through Justice Tate, makes it quite clear that he is. The writers fully agree.

EXPERT WITNESSES

Testimony by Physician as to Basis for Diagnosis

Under certain circumstances, says the court in *State v. Watley*,[97] in an opinion authored by Justice Tate, a physician may testify as to what a patient told him pertinent to a diagnosis in order to provide the basis for his opinion. The

92. 309 So. 2d 303 (La. 1975).

93. The court points out that LA. R.S. 13:1580 (1950) makes it clear that a juvenile court status adjudication shall not be considered a conviction for this purpose.

94. 415 U.S. 308 (1974).

95. 259 La. 105, 249 So. 2d 540 (1971), discussed in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 33 LA. L. REV. 306, 311-12 (1973), reprinted in PUGH at 104-05.

96. 304 So. 2d 300 (La. 1974).

97. 301 So. 2d 332 (La. 1974).

problem is a very delicate one, however, especially in a criminal case, and the court reviews the authorities and the limiting rules evolved for the protection of the defendant.[98]

PRIVILEGED COMMUNICATIONS

Informer Privilege

Although there was for a time doubt as to whether an informer privilege exists in Louisiana,[99] it is now clear that Louisiana courts will recognize a privilege as to the identity of an informer under certain circumstances.[100] There are constitutional limitations as to the applicability of such a privilege, however,[101] and the nature and scope of the privilege in Louisiana is still undefined by statute.

The privilege was the subject of several decisions again this year. Taking a receptive view to its availability, the Louisiana Supreme Court in *State v. Rhodes*[102] said:

> The "informer privilege" is a privilege of withholding the identity of an informant who supplies information to law enforcement officials concerning crime. The privilege is founded upon public policy and is designed to encourage the reporting of crime. Disclosure of the informant's identity is warranted only under exceptional circumstances for the prevention of injustice. The burden is on defendant to show such exceptional circumstances.[103]

Drawing on earlier decisions, the court in *State v. Santos*[104] said that the test to be applied is whether "disclosure of the informant's identity [is] essential for the defendant's defense on the merits or for his grounds for the motion to suppress."[105] The applicability of the test in a particular case,

98. *See* Becnel v. Ward, 286 So. 2d 731 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (La. 1974).

99. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 384 (1971), reprinted in PUGH at 186.

100. *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 313 (1973), reprinted in PUGH at 187.

101. *See* Roviaro v. United States, 353 U.S. 53 (1957). *See also* Davis v. Alaska, 415 U.S. 308 (1974); Washington v. Texas, 388 U.S. 14 (1967).

102. 308 So. 2d 770 (La. 1975).

103. *Id.* at 773, *citing* State v. Dotson, 260 La. 471, 256 So. 2d 594 (1971), *cert. denied*, 409 U.S. 913 (1972).

104. 309 So. 2d 129 (La. 1975).

105. *Id.* at 132. *See also* State v. Thorson, 302 So. 2d 578 (La. 1974) (concerning the availability of the privilege).

however, is difficult to determine indeed,[106] for under prevailing Louisiana practice a defendant's inability to find out the identity of the informant makes it peculiarly difficult for him to demonstrate the benefits he hopefully would derive from the testimony of the unidentified unknown individual.

The problem was creatively dealt with by the United States Supreme Court when it promulgated the Federal Rules of Evidence. In Rule 510 of the Rules as promulgated, the Supreme Court provided that under certain circumstances a trial judge can make an in camera investigation apart from both counsel and defendant.[107] Congress, however, chose to deal much less extensively with the privilege area, and this rule and the other privilege rules promulgated by the Supreme Court were rejected by Congress. It is submitted, however, that Louisiana should give thought to adopting the approach taken by the United States Supreme Court in this area.

An interesting question not previously decided in Louisiana is whether the informer privilege is available as to information provided not only to a law enforcement officer but also to a legislative committee or a staff member thereof. In a per curiam decision in *In re Baer*,[108] over a vigorous dissenting opinion by Justice Summers, the Louisiana Supreme Court avoided confronting the question full force in what Justice Summers declared to be an "offhand fashion"[109] of disposing of the matter. The court in its per curiam stated:

> The informer privilege—based on the need of assuring a free disclosure of information to a governmental source through assuring against unnecessary disclosure of the informer's identity—is generally recognized in Louisiana, although the promised secrecy may be required to yield to competing interests of other constitutional or governmental interest where circumstances show the overriding weight of the latter.[110]

It went on to find, however, that in light of the posture of the case as presented,

> [n]o practical result, therefore, can be effectuated by our

106. *See* State v. Dotson, 260 La. 471, 256 So. 2d 594 (original hearing), 260 La. 500, 256 So. 2d 604 (1971) (rehearing).

107. 56 F.R.D. 183, 510 (1972).

108. 310 So. 2d 537 (La. 1975).

109. *Id.* at 541.

110. *Id.* at 538.

> ruling in the abstract on the sensitive and delicate question of the separation of powers between executive (district attorney), judicial (grand jury), and legislative (privilege of aides against testifying) branches of government.[111]

Interestingly, the promulgated but unadopted Federal Rule of Evidence 510 would recognize, under appropriate circumstances, a privilege as to the identity of an informer who has provided information to a legislative investigating committee or members of its staff.

Legislative Privilege

Is there some kind of legislative privilege available in Louisiana as to the information derived by a legislative investigating committee and as to the names of informers who supplied information to the committee or its staff? Further, is such a privilege available to prevent disclosure before a parish grand jury investigating the same subject matter as the legislative committee?[112] These questions lay at the heart of the controversy presented in *In re Baer*,[113] but in light of the status of the investigations a majority of the court concluded that it would be unwise and inappropriate to differentiate and decide the various issues. Justice Summers wrote a vigorous dissenting opinion disagreeing with the court's handling of the admittedly delicate issues presented in the case.

Because of the interest and attention given the problems of governmental privilege in the wake of the Watergate experience, it is to be anticipated that issues presented to the court in this area will proliferate. Perhaps Louisiana should give thought to formulating a statute that would regulate the legitimate role of various governmental privileges in this area.[114]

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111. *Id.*

112. For a discussion of the informer privilege aspect of the case, *see* text at notes 99-111, *supra*.

113. 310 So. 2d 537 (La. 1975).

114. See the efforts to do this in FED. R. EVID. 509 as promulgated by the United States Supreme Court but rejected by Congress in favor of a much more laconic approach to the whole question of privilege in the federal courts. 56 F.R.D. 183, 251 (1972).

Grand Jury Proceedings

Following the reasoning of *State v. Terrebonne*,[115] a majority of the Louisiana Supreme Court in *State v. Ivy*[116] held that because of the secrecy of grand jury proceedings it was improper for the district attorney to use grand jury testimony in cross-examination of a defense witness. Relying at least in part upon the fact that when defense counsel had objected the trial court had ordered that a copy of the grand jury testimony be made available to him, the court held that under the circumstances presented, the error was "harmless."[117]

The secrecy of grand jury testimony was also reaffirmed in *State v. Williams*,[118] which denied that a defendant has a constitutional right to see a transcript of prosecution witnesses' testimony before the grand jury. However, it is noteworthy that in concurring opinions in *Williams* Justices Tate and Barham forcefully argued that once a defendant is indicted he should have access to grand jury testimony.[119]

HEARSAY

Admissions—Statements by Police Offered Against Prosecution

In *State v. Carvin*,[120] the Louisiana Supreme Court, speaking through Justice Tate, indicates that statements of a contemporaneous sense impression made by a police officer during the course of a police investigation[121] might well be

115. 256 La. 385, 236 So. 2d 773 (1970).

116. 307 So. 2d 587 (La. 1975).

117. For developments relative to the "harmless error doctrine" see text at notes 174-80, *infra*.

118. 310 So. 2d 528 (La. 1975).

119. *Id.* at 536. Similar pronouncements are made in *State v. Ivy*, 307 So. 2d 587 (La. 1975), wherein Justice Tate, concurring, observed: "After indictment, the importance of grand jury secrecy as to those witnesses who testify at the trial is primed by the then more important value of fair trial for both the state and the accused. This value is better served by permitting this check upon truthfulness of trial testimony, rather than by permitting grand jury secrecy to be used to cloak present trial perjury or inaccuracy." *Id.* at 593.

120. 308 So. 2d 757 (La. 1975).

121. See discussion of res gestae and contemporaneous sense impression in text at notes 129-30, *infra*.

admissible against the state as an admission, as a statement by its agent. Normally in a criminal case the profession is prone to think of admissions as statements made by the defendant offered by the state, not statements made by an agent of the state offered by the defendant. Thus the court's suggestion has an intriguing potential for future development.

Admissions—Attempts to Intimidate Witnesses and Flight to Avoid Trial

In *State v. Graves*,[122] despite the problems created by the other crimes exclusionary rule,[123] the court indicated that a defendant's criminal flight from the state to avoid trial and criminal attempts by him to procure false alibi witnesses are admissible against him as admissions. Citing cases from other jurisdictions, the court further indicates that when a third party has attempted to induce a witness to testify falsely or to fabricate evidence, such evidence may also be admissible as an admission against the defendant, but "[b]efore such attempts are admissible . . . there must be some evidence to connect the accused therewith or to show that the attempt by a third person was made with the authorization of the accused."[124]

Admissions—Plea Bargaining

In *State v. Gaspard*[125] the court makes it clear that the fact that a defendant has engaged in an unsuccessful effort to plea bargain is inadmissible as an admission in a criminal trial for the offense underlying the successful attempt at plea

122. 301 So. 2d 864 (La. 1974).

123. *See* Comment, *Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., in the Case in Chief*, 33 LA. L. REV. 614 (1973), reprinted in PUGH at 30. For a discussion of this aspect of the *Graves* case, see text at notes 5-14, *supra*.

124. 301 So. 2d 864, 866 (La. 1974). Justice Barham argues very persuasively in dissent that under the facts of the instant case, the prosecutor's comments in his opening statement as to such matters were extremely prejudicial and should have been reversible error, for no evidence was adduced indicating that the third person (defendant's wife) acted with his authority or that any of the improper conduct mentioned actually occurred.

125. 301 So. 2d 344 (La. 1974). *See also* State v. Hammler, 312 So. 2d 306 (La. 1975) (Confessions should be cleansed of statements about unsuccessful plea bargaining.); State v. Kaufman, 304 So. 2d 300 (La. 1975).

negotiation. Although such negotiations are arguably relevant, the policy of the law to encourage guilty pleas militates against the admissibility of such evidence.[126] The Federal Rules of Evidence take a similar position.[127] Like considerations form the basis of the rule against the admissibility of offers to compromise a disputed claim in civil cases.[128]

Res Gestae—Contemporaneous Sense Impression

The Federal Rules of Evidence recognize present sense impression as an exception to the hearsay rule.[129] To somewhat similar effect, in *State v. Carvin*,[130] the court takes the position that a statement made by a police officer during the course of a police investigation should have been admissible as a statement of contemporaneous sense impression. A deputy made the statement as he felt the motor of the car parked outside defendant's home not very long after the alleged shooting. His declaration that the motor was "cool" tended to negative the prosecution's claim that the car had recently been driven sixty miles.

Business Records—Computer Print-Out Sheets

The nature, availability and extent of a business records exception to the hearsay rule in Louisiana civil and criminal cases are all subject to doubt and confusion.[131] The problem is necessarily compounded when one is confronted with the admissibility of computer print-out sheets in a criminal case. Nevertheless, in *State v. Hodgeson*,[132] after a survey of recent cases in other jurisdictions dealing with the problem, the Louisiana Supreme Court concluded that under appropriate circumstances, a telephone company's computer print-out

126. MCCORMICK § 274 at 665.

127. FED. R. EVID. 410.

128. MCCORMICK § 274 at 663.

129. FED. R. EVID. 803(1) excepts from the hearsay rule a "statement describing or explaining an event or condition, or immediately thereafter."

130. 308 So. 2d 757 (La. 1975).

131. *See The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 547 (1975); *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 388 (1971), reprinted in PUGH at 490; Comment, *Business Records in Louisiana As An Exception to the Hearsay Rule*, 21 LA. L. REV. 449 (1961), reprinted in PUGH at 476.

132. 305 So. 2d 421 (La. 1974).

sheets were admissible to show when and to whom the defendant had made certain telephone calls. In so holding, the court adopted with approval the criteria laid down by the Mississippi Supreme Court,[133] coupled with limiting language provided by a United States Court of Appeals judge.[134]

Former Testimony—Showing of Unavailability

For the state in a criminal case to utilize testimony of a non-defendant witness given at a prior hearing, the witness must be "unavailable."[135] To show that such a witness is unavailable, the state must show that a diligent good faith effort has been made to locate him.[136] No such showing is made, says the majority of the court in *State v. Moore*,[137] by showing merely that the witness is absent from the jurisdiction, and that according to the sheriff's return the maker

133. "[W]e hold the print-out sheets of business records stored on electronic computing equipment are admissible in evidence if relevant and material, without the necessity of identifying, locating, and producing as witnesses the individuals who made the entries in the regular course of business if it is shown (1) that the electronic computing equipment is recognized as standard equipment, (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded, and (3) the foundation testimony satisfied the court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission." King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393, 398 (Miss. 1969), *quoted in* 305 So. 2d at 428.

134. "If a machine is to testify against an accused, the courts must, at the very least, be satisfied with all reasonable certainty that both the machine and those who supply its information have performed their functions with utmost accuracy. Therefore, it is essential that the trial court be convinced of the trustworthiness of the particular records before admitting them into evidence. And it should be convinced by proof presented by the party seeking to introduce the evidence rather than receiving the evidence upon the basis of an inadequate foundation and placing the burden upon the objector to demonstrate its weakness." United States v. De Georgia, 420 F.2d 889, 894-96 (9th Cir. 1969) (Ely, J., concurring), *quoted in* 305 So. 2d at 428.

135. A witness who at the trial takes the fifth amendment is deemed unavailable for this purpose. State v. Dotch, 298 So. 2d 742 (La. 1974).

136. *See* State v. Sam, 283 So. 2d 81 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Criminal Procedure II*, 34 LA. L. REV. 427, 437 (1974); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 547 (1975). The required showing was found to have been made in *State v. Green*, 296 So. 2d 290 (La. 1974), and *State v. Dotch*, 298 So. 2d 742 (La. 1974). A divided court in *State v. Kaufman*, 304 So. 2d 300 (La. 1974), found that the required showing had not been made.

137. 305 So. 2d 532 (La. 1975).

thereof was "Unable to Locate" the witness. Emphasizing that both Louisiana and Illinois (the state to which the witness had allegedly moved) had adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings,[138] the majority of the court, through forceful and eloquent decisions authored by Justices Tate and Calogero, held that the error necessitated reversal.[139]

Complaint to Police—General Rule

In *State v. Murphy*[140] the court very properly held inadmissible statements made in a complaint to the police by an informer. There was no independent relevance to such statements and the court, citing and relying on *State v. Kimble*[141] and *Favre v. Henderson*,[142] held that although a police officer may state that he made an arrest or search as a result of a complaint, he may not properly relate the nature of the complaint. The earlier view taken in *State v. McLeod*[143] in this connection, which in the opinion of the writers was erroneous, appears rejected.

The salutary *Murphy* decision also seems contrary to obiter dictum in the earlier and analogous case of *State v. White*,[144] in which the court held that a teletype message from another police department saying that a stolen vehicle had been found in the possession of the defendant was admissible as fact of utterance. It is believed that the classification of the evidence as non-hearsay in *White* was in error, for in that car theft prosecution the truth of the statement was of great relevance and would impress the jury, whereas the relevance of the contents of the teletype apart from its truth did not appear to be very significant. Further, in *White* defendant had no opportunity to confront or cross-examine the police officer who sent the teletype message and thereby asserted that defendant was in possession of the car in question.

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138. LA. CODE CRIM. P. arts. 741-45; 38 ILL. ANN. STAT. §§ 156-1-6.

139. For a discussion of harmless error in a criminal case, see text at notes 174-80, *infra*.

140. 309 So. 2d 134 (La. 1975).

141. 214 La. 58, 36 So. 2d 637 (1948).

142. 464 F.2d 359 (5th Cir. 1972), *cert. denied*, 409 U.S. 942 (1972).

143. 271 So. 2d 45 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 455 (1974).

144. 301 So. 2d 321 (La. 1974).

Complaint of Victim of Alleged Rape

In *State v. Pace*,[145] following writings and jurisprudence elsewhere in the country relative to complaints by victims of alleged rape, the court held admissible a complaint of rape made to her mother by a six-year-old girl the same day as the alleged sexual attack.[146] McCormick, before discussing the origins of the special rule of admissibility in this area, indicates that for a complaint of sexual attack to be admissible there must have been no unexplained lapse of time between the occurrence and the complaint, and the time lapse must not be "inconsistent with the occurrence of the offense."[147] Nothing in the *Pace* case violates the limitation.

A more questionable application of this rule of admissibility is found in *State v. Brown*.[148] In *Brown* a bruised sixteen-year-old girl, wearing different clothes from those she had worn to school that morning, did not immediately tell of the alleged rape when she returned home. After questioning by her mother, she "broke down" and reported being raped by three "boys" and explained that she didn't tell her mother of it immediately because one of the boys threatened her life if she reported it. According to McCormick, the origin of the admissibility rule in this area "was to repel any inference that because the victim did not complain no outrage had in fact transpired."[149] Since here it was not until after the prosecutrix "broke down" under questioning by her mother that the complaint of rape was made, it seems much more difficult to fit the complaint under this special rule of admissibility.

DISCOVERY, PRODUCTION, AND INSPECTION OF EVIDENCE IN CRIMINAL CASES

Scope of Pre-Trial Discovery

In *State v. Collins*[150] Justice Summers affords a nice collection of cases and a summary of a defendant's current

145. 301 So. 2d 323 (La. 1974).

146. See also *State v. Morgan*, 296 So. 2d 286 (La. 1974), in which the court found that a similar statement was admissible as part of the res gestae, a basis also relied upon by the court for the admissibility of the complaint in the *Pace* case.

147. MCCORMICK § 297 at 709.

148. 302 So. 2d 290 (La. 1974).

149. MCCORMICK § 297 at 709. *See also* 6 J. WIGMORE, EVIDENCE §§ 1760-61 at 170-175 (3d ed. 1940).

150. 308 So. 2d 263 (La. 1975).

rights to pre-trial discovery in Louisiana criminal cases. In *State v. Breston*,[151] Justices Barham and Tate persuasively argue in concurring opinions that a defendant's right to pre-trial discovery in criminal cases should be expanded. As Justice Barham indicates, Louisiana Code of Criminal Procedure article 703(b)'s motion to suppress a written confession or inculpatory statement has now been read to include a motion to suppress oral statements.[152] And as Justice Tate in statesmanlike language cogently observes:

> . . . the requirements of a fair trial and of federal due process rulings are harbingers of change that conscientious prosecutors might well note. . . . Many if not most of the enlightened prosecutors of this state are affording pre-trial discovery beyond that minimum now required by jurisprudential holdings of our state courts. By so doing, they are not only living up to an obligation to assure an accused a proper opportunity to prepare his defense, but they also avoid courting the reversals that an obstinate policy of non-disclosure inevitably will produce.[153]

Pre-Trial Inspection—Radar Unit

One of the most important cases relative to pre-trial discovery during the past year was *City of Shreveport v. Scott*.[154] In a traffic case involving an alleged speeding offense, a divided court in advance of trial granted writs and ordered that defendant be permitted to inspect and test the radar unit and the radar maintenance manual, under the supervision of the trial court. The decision seems completely sound.[155]

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151. 304 So. 2d 313 (La. 1974).

152. *Id.* at 317. *See* State v. Jenkins, 302 So. 2d 20 (La. 1974); State v. Davis, 300 So. 2d 496 (La. 1974), *writ dismissal*, 309 So. 2d 335 (La. 1974).

153. 304 So. 2d 313, 317 (La. 1974).

154. 303 So. 2d 173 (La. 1974).

155. See *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975), in which in a case from Louisiana, a unanimous court stated: "Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." *Id.* at 746.

Pre-Trial Discovery as to Defendant's Written and Oral Statements

Although a defendant may not have the right to pre-trial discovery of an oral inculpatory statement, a good faith denial by the state in advance of trial that it possesses such statement, says a divided court in *State v. Boothe*,[156] necessitates reversal, even though immediately before the trial the state complied with the requirements of Louisiana Code of Criminal Procedure article 768 relative to giving of written notice of intention to introduce inculpatory statements. When the defense has made a proper demand upon the state as to whether it possesses any written confessions, admissions or statements, a divided court in *State v. Hammler*[157] said that the prosecution is under a continuing duty to notify defendant of same.

Right of Defendant to Inspect Witness's Memorandum

Recognizing that defense counsel has the right to inspect a memorandum used by a witness on the stand to refresh his memory,[158] the majority of the court in *State v. Perkins*[159] held that if a police officer called by the prosecution has referred to notes made by him shortly before trial from the police report he has with him on the stand, defense counsel has the right to see not merely the notes, but also the police report itself.

A majority of the court in *State v. Lane*[160] continued to adhere to the view taken by a divided court in *State v. Payton*[161] that defense counsel has no absolute right to inspect a police report consulted by a police officer witness outside the courtroom, prior to trial, to refresh his memory. If, as demonstrated by *State v. Lee*,[162] a defendant can bear

156. 310 So. 2d 826 (La. 1975).

157. 312 So. 2d 306 (La. 1975).

158. *See* State v. Tharp, 284 So. 2d 536 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 534-35 (1975).

159. 310 So. 2d 591 (La. 1975).

160. 302 So. 2d 880 (La. 1974). *See also* State v. Graves, 301 So. 2d 864 (La. 1974).

161. 294 So. 2d 211 (La. 1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 534 (1975).

162. 311 So. 2d 876 (La. 1975).

the difficult burden of showing that an out-of-court statement made by an opponent's witness is inconsistent with the testimony given on the stand, he has a right to force production of such out-of-court statement.

PRESERVING RIGHTS FOR APPEAL

Contemporaneous Objection Requirement

In general, if evidence is admitted in a Louisiana trial court without objection or with only a general objection, rights on appeal are lost.[163] *State v. Bird*[164] presents a very striking illustraton of the application of the rule, for there the prosecutrix in a rape case, without objection, had been permitted to testify in "response to questions about her fear of defendant," that she

> knew the things he has done. He tried to cut my husband's throat with a razor, he stabbed a guy and almost left him for dead, and he cut my husband's uncle across the chest, and he beat his wife, and he knocked his mother down—all of these things were going through my mind at the time.[165]

Applying the traditional rule, the court held that because of failure to object in the trial court defense counsel could not successfully assert his objection on appeal.

Although in general the contemporaneous objection rule is sound, perhaps there should be some leeway to redress an egregious error as to inadmissible evidence even in the absence of a contemporaneous objection. Perhaps Louisiana should give thought to adopting an escape hatch provision similar to that adopted by Congress in the recently enacted Federal Rules of Evidence as to "plain error."[166] Although

163. *See* LA. CODE CRIM. P. arts. 841-45, *as amended by* La. Acts 1974, No. 207. For recent cases decided during the past term involving the problem, *see* State v. Oliveaux, 312 So. 2d 337 (La. 1975), State v. Craddock, 307 So. 2d 342 (La. 1975), State v. Bird, 302 So. 2d 589 (La. 1974), State v. Refuge, 300 So. 2d 489 (La. 1974), and State v. Hillman, 298 So. 2d 746 (La. 1974). When the objectionable evidence violates a defendant's federal constitutional rights, however, more protective standards adhere. See Comment, *Post-Conviction Remedies and Waiver of Constitutional Rights*, 26 LA. L. REV. 705 (1966), reprinted in PUGH at 567.

164. 302 So. 2d 589 (La. 1974).

165. *Id.* at 591.

166. FED. R. EVID. 103(d).

adopting the contemporaneous objection rule as the usual requirement,[167] the Federal Rules of Evidence provide in Rule 103(d) that the court may take notice of plain errors affecting substantial rights although not made the subject of an objection.

Louisiana's provision in this area is more limiting than the federal. The Louisiana Code of Criminal Procedure provides that even absent an objection in the trial court the appellate court may take cognizance of such errors "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."[168] In *State v. Oliveaux*,[169] Justice Calogero carefully outlined the ambit of this review as including those errors reflected in

> the caption, the statement of time and place of holding court, the indictment or information and the endorsement thereon, the arraignment, the plea of the accused, the mentioning of the impanelling of the jury, the verdict, and the judgment . . . the bill of particulars filed in connection with a short form indictment or information . . . and in capital cases, a minute entry indicating that the jury had been sequestered as required by La. Code Crim. P. art. 791 [citations omitted].[170]

Offer of Proof

The necessity, nature and availability of an offer of proof in Louisiana criminal cases has been cloudy.[171] In *State v. George*,[172] an opinion authored by Justice Calogero, the court makes clear that to preserve his rights on appeal, a party

167. See FED. R. EVID. 103(a)(1) and (2), which provide that "(a) . . . Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) . . . In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

168. LA. CODE CRIM. P. art. 920(2).

169. 312 So. 2d 337 (La. 1975).

170. *Id.* at 339.

171. In the civil area, however, it is clearly provided for in the salutary provisions of LA. CODE CIV. P. art. 1636.

172. 312 So. 2d 860 (La. 1975).

prevented by the trial court from adducing evidence may, and under some circumstances must, state reasons in support of the evidence's admissibility.[173]

Harmless Error

The "harmless error doctrine" has given Louisiana courts much difficulty and still divides the Louisiana Supreme Court.[174] The important case of *State v. Michelli*[175] represents a significant shift in the majority position.[176] Speaking unenthusiastically of the "harmless error rule," the majority through Justice Dixon said:

> "Harmless error" is a doctrine which permits an appellate court to affirm a conviction in spite of error appearing in the record. It has been called a "cop out" for appellate judges—an abdication of the judicial function in criminal appeals.
>
> One of the few methods available for enforcing legal and constitutional procedures in the system of criminal justice is the reversal of convictions by appellate courts for errors of law. The American experience, the experience of this court, in fact, is that nothing short of reversal of convictions is understood or heeded by trial judges, prosecutors and police. Warnings by this court that certain procedures are illegal are, in the absence of a reversal, often ignored or misconstrued. If there is no penalty for error in the apprehension and prosecution of offenders, expediency seems to prompt a repetition of the error.[177]

In *Michelli* the court found a violation of defendant's federal constitutional right of confrontation and concluded that because of Louisiana's limitations on appellate review it was

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173. The recently adopted Federal Rules of Evidence contain a helpful express provision as to offer of proof in Rule 103(a)(2), set forth in footnote 167, *supra.*

174. For an excellent discussion of the federal constitutional test in recent Louisiana jurisprudence, see Comment, *Harmless Constitutional Error —A Louisiana Dilemma?*, 33 LA. L. REV. 82 (1972), reprinted in PUGH at 550.

175. 301 So. 2d 577 (La. 1974).

176. The rules announced in the *Michelli* case were followed by the court in a 4-3 decision in *State v. Herman*, 304 So. 2d 322 (La. 1974). State v. Murphy, 309 So. 2d 134 (La. 1975); State v. Moore, 305 So. 2d 532 (La. 1975).

177. 301 So. 2d 577, 579 (La. 1974).

impossible for Louisiana effectively to apply the federal harmless error test.[178] The federal test, said the Louisiana Supreme Court, requires a review of the entire record to determine whether the guilt of the accused was overwhelmingly indicated, and because of Louisiana's limitations on appellate review,[179] a Louisiana state court could not legally make such a review. Further, the court pointed out that Louisiana's harmless error test is stated in the disjunctive, and a finding of any of the three aspects precipitates reversal. Since here there was, in the language of the statute, "a substantial violation of a constitutional or statutory right,"[180] reversal necessarily followed.

JUVENILE PROCEEDINGS

Evidentiary Rules Applicable in Juvenile Proceedings

In a Third Circuit Court of Appeal decision Judge Watson, speaking for the majority as to the propriety of receiving a so-called "Confidential Pre-Hearing Investigation Report" prepared by a juvenile probation and parole officer, stated:

> We believe it to be reversible error for a juvenile court to receive a report containing hearsay evidence, opinions and recommendations prior to making an adjudication.[181]

In addition, the case affords a helpful discussion of the rules governing procedures in juvenile court, and emphasizes the importance and wisdom of sharply differentiating the adjudicatory and dispositional phases of a juvenile proceeding.

178. Both LA. CONST. art. V, § 5(c) and La. Const. art. VII, § 10 (1921), limit appellate review in criminal cases to questions of law, and as pointed out by the court, the limitation has been given broad scope. Further, the court pointed to the limitations in appellate review imposed by the then prevailing bill of exceptions procedure. LA. CODE CRIM. P. arts. 841-45. Although the archaic procedure has been replaced by a much more enlightened method, LA. CODE CRIM. P. arts. 841-45, *as amended by* La. Acts 1974, No. 207, the change presumably would not dictate a different decision in the harmless error context.

179. *Id.*

180. LA. CODE CRIM. P. art. 921.

181. State *ex rel.* Simon, 295 So. 2d 473 (La. App. 3d Cir. 1974). The court in this connection relied upon *State ex rel. Elliott*, 206 So. 2d 802 (La. App. 2d Cir. 1968), discussed in *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Evidence*, 29 LA. L. REV. 310, 319 (1969), and *In Re Gault*, 387 U.S. 1 (1967). *See also* State *ex rel.* Simmons, 299 So. 2d 906 (La. App. 3d Cir. 1974). Judge Domengeaux argues in dissent that the *Simmons* case should properly be considered a juvenile probation revocation hearing where the constitutional safeguards are less stringent. *Id.* at 909.